

ORIGINAL

DOCKET FILE (NEW ORIGINAL)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

GTE System Telephone Companies)

GSTC Tariff FCC No. 1)

GSTC Trans. No. 260)

CC Docket No. 98-167

RECEIVED

OCT - 5 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Competitive Pricing Division

**OPPOSITION TO DIRECT CASE
OF FLORIDA DIGITAL NETWORK, INC.**

Florida Digital Network, Inc. ("Florida Digital"), by its undersigned counsel, pursuant to the Order Suspending Tariff and Designating Issues for Investigation in this proceeding, submits these comments on the direct case filed by GTE System Telephone Companies ("GSTC"). Florida Digital opposes the direct case, and asks that the Commission reject the proposed ADSL tariff because the Commission has failed to meet its obligation to assure that the rates, terms and conditions of GSTC's proposed services are just and reasonable.

Florida Digital filed comments in the proceedings considering the ADSL tariffs of GTE Telephone Operating Companies, BellSouth Telecommunications, Inc., and Pacific Bell Telephone Company.¹ Because the tariff under investigation in this proceeding "is identical to the ADSL

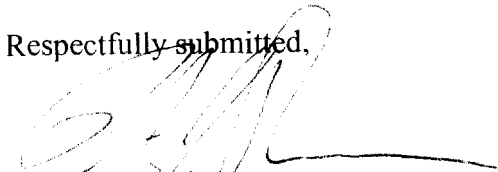
¹GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Trans. No. 1148 CC Docket No. 98-79; BellSouth Telecommunications, Inc., Tariff FCC No. 1 Access Service, BellSouth Trans. No. 476, CC Docket No. 98-161; Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Trans. No. 1986, CC Docket No. 98-103.

No. of Copies rec'd
List ABCDE

0 of 4

offering previously filed in the GTOC Tariff FCC No. 1."² Florida Digital provides a copy of its Comments on the Direct Cases filed on September 18, 1998, and incorporates those comments into this investigation by reference.

Respectfully submitted,



Eric J. Brandman

Morton J. Posner

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K Street, N.W.

Washington, DC 20007

Tel. 202-424-7771

Fax 202-424-7645

Dated: October 5, 1998

Counsel for Florida Digital Network, Inc.

²Direct Case of GTE at 2.

ORIGINAL
DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

SEP 18 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
GTE Telephone Operating Companies)	
GTOC Tariff FCC No. 1)	CC Docket No. 98-79
GTOC Trans. No. 1148)	
)	
BellSouth Telecommunications, Inc.,)	
Tariff FCC No. 1 Access Service)	CC Docket No. 98-161
BellSouth Trans. No. 476)	
)	
Pacific Bell Telephone Company)	
Pacific Bell Tariff FCC No. 128)	CC Docket No. 98-103
Pacific Trans. No. 1986)	
)	
To: Competitive Pricing Division)	

**OPPOSITION TO DIRECT CASES
OF FLORIDA DIGITAL NETWORK, INC.**

Florida Digital Network, Inc. ("Florida Digital"), by its undersigned counsel, pursuant to applicable Orders in the above-referenced proceedings,¹ submits this opposition to the direct cases filed by GTE Telephone Operating Companies ("GTE"), BellSouth Telecommunications, Inc. ("BellSouth"), and Pacific Bell Telephone Company ("Pacific Bell"). Florida Digital opposes the direct cases, and asks that the Commission reject the proposed ADSL tariffs because the

¹ In re GTE Transmittal No. 1148, CC Docket No. 98-79, *Order Designating Issues for Investigation*, DA 98-1667 (rel. Aug. 20, 1998)[hereinafter *GTE Order*]; In re BellSouth Transmittal No. 476, CC Docket No. 98-161, *Order Suspending Tariff and Designating Issues for Investigation*, DA 98-1734 (rel. Sep. 1, 1998)[hereinafter *BellSouth Order*]; In re Pacific Transmittal No. 1986, *Order Designating Issues for Investigation*, DA 98-1772 (rel. Sep. 2, 1998)[hereinafter *Pacific Order*].

OH

Commission has failed to meet its obligation to assure that the rates, terms and conditions of GTE's, BellSouth's, and Pacific Bell's proposed services are just and reasonable.

Sections 201 and 202 of the Communications Act require that the rates, terms, and conditions of a carrier's proposed interstate tariff be just and reasonable. Under Section 204(a)(1) of the Communications Act, the Commission may suspend a tariff for up to five months and initiate an investigation of the lawfulness of the proposed tariff. The Commission will suspend and investigate a tariff if a substantial question of lawfulness is raised. The Commission must conclude any such an investigation within five months of the date the tariff becomes effective.² Thus, under this statutory framework, the Commission is required to evaluate proposed tariffs to determine whether the rates, terms, and conditions proposed by the carrier are just and reasonable under the standards of Sections 201-205 of the Act, suspend and investigate the tariff if a substantial question of lawfulness is raised, and then conclude the investigation within five months.

Assuming that the Commission determines that these ADSL tariffs may be filed at the Commission,³ Florida Digital is concerned that the Commission has disregarded the statutory standards for tariff review and investigations in this case. Numerous petitions to suspend and investigate all three tariffs were filed raising a number of serious issues. For example, one party

² 47 U.S.C. Sec. 204(a)(2)(A).

³ Several Petitions to Reject the tariffs raise serious questions as to whether the proposed service is exchange access at all. GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Trans. No. 1148, *Petition to Reject, or to Suspend and Investigate* of Focal Communications, Inc. and ICG Communications, Inc. at 2, CC Docket No. 98-79 (May 22, 1998); BellSouth Telecommunications, Inc., Tariff FCC No. 1 Access Service, BellSouth Trans. No. 476, *Petition to Reject, or to Suspend and Investigate* of Hyperion Communications, et. al at 2, CC Docket No. 98-161 (Aug. 25, 1998).

conducted a comparison of GTE's prices for unbundled network elements and the proposed prices for DSL that shows that the DSL prices are substantially below cost.⁴ This raises a host of pricing issues concerning whether GTE's rates are cost justified and what is the appropriate allocation of loop costs between DSL and services (interstate and intrastate) to which those costs are currently allocated.⁵ Assuring that prices are just and reasonable is a key responsibility of the Commission under Sections 201-205. Another party pointed out that the tariff provides GTE an opportunity to discriminate in the provision of the service by limiting the availability of the consumer DSL modems needed to receive the service.⁶

The Bureau's designation orders, however, failed to address these and other serious issues raised in petitions to suspend and investigate in that the Bureau designated for investigation only the single issue of whether GTE's, BellSouth's, Pacific Bell's proposed services are jurisdictionally interstate.⁷ At a minimum, the Bureau was obligated to address and explain why the issues raised in the petitions did not warrant investigation. Moreover, Florida Digital does not believe that the current record is sufficient for the Commission to now resolve these issues in favor of GTE, BellSouth, and Pacific Bell, given that the Bureau has failed, for example, to obtain the cost data that

⁴ *Petition to Reject, or to Suspend and Investigate* of NorthPoint Communications, Inc. at 2-3, CC Docket No. 98-161 (Aug. 25, 1998).

⁵ The Commission has yet to resolve similar issues concerning allocation of loop costs between telephone service and video costs. In re Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services, CC Docket No. 96-112, *Notice of Proposed Rulemaking*, FCC 96-214 (rel. May 10, 1996).

⁶ *Petition to Suspend and Investigate* of MCI at 7, CC Docket No. 98-79 (May 22, 1998).

⁷ *GTE Order* para.12; *BellSouth Order* para.10; *Pacific Order* para.10.

could justify the proposed rates. Nor has the Commission obtained a record that would permit it to determine how the costs of the loop should be appropriately allocated between each of the ILEC's alleged interstate service and local services. While the Commission has some discretion as to what issues to designate for investigation, it would be an abuse of that discretion for the Commission to fail to consider issues that go to the heart of the Act during the initial tariff review and investigation process. Florida Digital believes that the structure for tariff review established in the Act envisions that the Commission will review the tariff, examine substantial questions of lawfulness, and conclude its investigation of all such issues within, not after, the five months statutory deadline. DSL is a new service that many competitive LECs are attempting to provide to consumers and businesses. These efforts can be substantially undercut if the Commission permits carriers to file and place in effect tariffs which may not meet key standards under the Act. This would also undercut the goals of the 1996 Act of creating a competitive environment for the provision of telecommunications. Florida Digital is concerned that the Commission has ignored its obligations under Sections 201-205 of the Act in a rush to turn this case into a vehicle to make a statement concerning the jurisdictional nature of Internet traffic

For many of the reasons identified in the numerous Petitions to Reject in this case, Florida Digital agrees with those Petitioners that these tariffs should not have been filed at the Commission at all. Assuming that the Commission nonetheless concludes that these tariffs should be entertained by the Commission, it should nonetheless now determine that they are unlawful, and reject them, based on the pricing, discrimination and other issues raised in the initial petitions but ignored by the

Bureau. This is the only remedy to the failure to conduct a more thorough investigation as required under the Act based on the matters raised in the initial petitions to suspend and investigate.

Respectfully submitted,



Eric J. Branfman

Morton J. Posner

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K Street, N.W.

Washington, DC 20007

Tel. 202-424-7771

Fax 202-424-7645

Dated: September 18, 1998

Counsel for Florida Digital Network, Inc.

CERTIFICATE OF SERVICE

I, Michael W. Fleming, hereby certify that on September 18, 1998 a copy of the foregoing "OPPOSITION TO DIRECT CASES OF FLORIDA DIGITAL NETWORK, INC." was sent by First Class United States Mail, postage prepaid, to the following:

***Magalie Roman Salas, Secretary**
(orig + 6 copies)
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20036

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

***Kathryn Brown (2 Copies)**
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, D.C. 200554

Richard M. Sbaratta (by fax)
General Attorney
BellSouth Corporation
Suite 1700
1155 Peachtree Street
Atlanta, GA 30309-3910

***Jane E. Jackson (2 Copies)**
Chief
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Thomas A. Pajda
SBC Communications, Inc.
One Bell Plaza
Room 3003
Dallas, TX 75202

***International Transcription Services, Inc.**
1231 20th Street, N.W.
Washington, D.C. 20036

Christine Jines (by fax)
SBC Communications, Inc.
1401 I Street, NW
Suite 1100
Washington, DC 20005

R. Michael Senkowski (by fax)
Gregory J. Vogt
Bryan N. Tramont
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Jill Morlock
Pacific Bell Telephone Company
Four Bell Plaza, Room 1950 04
Dallas, TX 19329

John F. Raposa
GTE Service Corporation
600 Hidden Ridge Corporation
HQE03J27
Irving, Texas 75038

Richard J. Metzger
Association for Local Telecommunications
Services
888 17th Street, N.W., Suite 900
Washington, D.C. 20006

Steven Gorosh
NorthPoint Communications, Inc.
222 Sutter Street
San Francisco, CA 94108

Riley M. Murphy
e•spire Communications, Inc.
133 National Business Parkway
Suite 200
Annapolis Junction, MD 20701

Brad E. Mutschelknaus
Jonathan E. Canis
Erin M. Reilly
Edward A. Yorkgitis, Jr.
Kelley Drye & Warren, LLP
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036

George Vradenburg, III
William W. Burrington
Jill A. Lesser
Steven N. Teplitz
AMERICA ONLINE, INC.
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Donna N. Lampert
Yaron Dori
James A. Kirland
James J. Valentino
Frank W. Lloyd
Gina M. Spade
Mintz, Levin, Cohn, Ferris, Glovsky
and, Popeo, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20036

Jerry Yanowitz
Jeffrey Sinsheimer
Glenn Semow
California Cable Television Association
4341 Piedmont Avenue
P.O. Box 11080
Oakland, CA 94611

Laura H. Phillips
J.G. Harrington
Christopher D. Libertelli
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

J. Manning Lee
Teleport Communications Group, Inc.
Two Teleport Drive, Suite 300
Staten Island, NY 10311

Barbara A. Dooley
Commercial Internet eXchange Association
1041 Sterling Road, Suite 104A
Herndon, VA 20170

Alan Buzacott
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Leon M. Kestenbaum
Jay C. Keithley
Marybeth M. Banks
Kent Y. Nakamura
Sprint Corporation
1850 M Street, N.W., 11th Floor
Washington, D.C. 20036

Jeffrey Blumenfeld
Christy C. Kunin
Blumenfeld & Cohen
1615 M Street, N.W., Suite 700
Washington, D.C. 20036

Thomas M. Koutsky
Covad Communications Co.
3560 Bassett Street
Santa Clara, CA 95054

Michael T. Wierich
Department of Justice
State of Oregon
1162 Court Street, NE
Salem, OR 97310

* By Hand Delivery



Michael W. Fleming

CERTIFICATE OF SERVICE

I, Michael W. Fleming, hereby certify that on October 5, 1998 a copy of the foregoing
was served by first class mail to the following:

*Magalie Roman Salas, Esq., Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

John F. Raposa
GTE Service Corporation
600 Hidden Ridge Corporation
HQE03J27
Irving, Texas 75038

*Kathryn Brown (2 copies)
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, D.C. 20554

Gail L. Polivy (by fax)
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036


*Jane E. Jackson (2 Copies)
Chief
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

George Vradenburg, III
America OnLine, Inc.
1101 Connecticut Ave., N.W.
Suite 400
Washington, D.C. 20036

*International Transcription Service, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Donna Lampert
Mintz, Levin, Cohn, Ferris, Glovsky &
Popeo
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004-2608

R. Michael Senkowski
Gregory J. Vogt
Bryan N. Tramont
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006



Michael W. Fleming

* VIA HAND DELIVERY